No. 12199

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

Appellant was indicted under Sections 697 and 715 of Title 38 of the United States Code on October 27, 1948 [R[1] 19]. The District Court had jurisdiction of the cause under Section 3231 of Title 18 of the United States Code. The offenses charged were committed in Los Angeles County, within the Central Division of the Southern District of California.[2] Judgment was entered on February 25, 1949 [R 27-31]. Notice of Appeal was filed on February 28, 1949 [R 32-33]. This Court has jurisdiction under Section 1291 of Title 28 of the United States Code.

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[1]References preceded by the letter "R" are to the typewritten "Transcript of Record" [Volume 1 of the Typed Record on Appeal]; those by the letter "T" are to the typewritten "Reporter's Transcript of Proceedings" [Volumes 2, 3 and 4 of the Typed Record on Appeal]; and those by "AB" to Appellant's Opening Brief.

[2]The Indictment so charged [R 2-19]. The evidence supported it. No attack is made on the grounds of lack of venue.

Statement of the Case.

On October 27, 1948, the Federal Grand Jury at Los Angeles returned an Indictment against appellant in seventeen counts, which was filed that day in the United States District Court for the Southern District of California, Central Division [R 2-19]. Each count of the Indictment charged appellant with knowingly causing to be made a false certificate concerning a claim for benefits under the Servicemen's Readjustment Act of 1944, in that she caused the Bank of America to certify in a Home Loan Report presented to the Veterans Administration that the price paid by a veteran for a lot was a specified figure and did not exceed the reasonable value thereof as determined by a proper appraisal, whereas, as appellant well knew and concealed from the bank and the Veterans Administration, the total price demanded and received by appellant was a higher figure than that stated in the report and also higher than the appraised reasonable value. Each of the seventeen counts involved a different veteran.

On November 1, 1948, appellant pleaded not guilty to all counts [R 19-20]. Trial was commenced before a jury on January 11, 1949 [R 20-21]. The Government dismissed 8 counts (1, 3, 8, 10, 13, 15, 16 and 17), and trial was had on the remaining 9 counts [R 21]. In the course of the trial, the Government dismissed one further count [Count 7, R 22]. The jury found appellant guilty on January 19, 1949, as to all 8 of the counts submitted to it [Counts 2, 4, 5, 6, 9, 11, 12 and 14, R 22-23]. Appellant's motion for a new trial [R 23-24] and for arrest of judgment [R 25] were denied [R 26-27]. Appellant's motion for judgment of acquittal was granted as to Counts 2 and 5, but denied as to all other counts [R 26].

On February 25, 1949, appellant was sentenced to imprisonment for one year and fined $1000 on each of Counts

4, 6, 9, 11, 12 and 14, and execution of such sentences was suspended and appellant placed on probation for five years, the conditions of which were: (1) that she make restitution to eighteen named veterans in the total sum of $7300; (2) that she pay a fine of $2700; and (3) that she obey all laws and comply with the rules of the Probation Office [R 27-32]. Notice of Appeal was filed on February 28, 1949 [R 32-33].

Statutes and Regulations Involved.

(a) Penal Statutes.

Section 1500(a) of the Servicemen's Readjustment Act of 1944—popularly known as the G. I. Bill of Rights—provides (38 U. S. C. 697(a)):

> "Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, shall be for application under this chapter.[1] For the purpose of carrying out any of the provisions of sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and this chapter, the Administrator shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable."

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[1]The exact language of this sentence as enacted was (58 Stat. 300):

"Except as otherwise provided in this Act, the administrative, definitive, and penal provisions under Public, Numbered 2, Seventy-third Congress, as amended, and the provisions of Public, Numbered 262, Seventy-fourth Congress, as amended (38 U. S. C. 450, 451, 454a and 556a), shall be for application under this Act."

Section 715 of Title 38 provides:[2]

> "Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both."

(b) Other Statutory Provisions.

The provisions of the Servicemen's Readjustment Act of 1944 relating to loans to veterans for the purchase of real estate are in Title III of the Act (38 U. S. C. 694, 694a-k; 58 Stat. 291-293, as amended by 59 Stat. 626-631). Under that Title, the United States, through the Administrator of Veterans Affairs, will guarantee, within certain limits, loans made to veterans of World War II for purchasing or constructing dwellings to be occupied as their homes. As to the requirements the loan must meet, Section 501 provides, in part (38 U. S. C. 694a):

> "Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is auto-

[2]Enacted as Sec. 15 of Public, Numbered 2, Seventy-third Congress (48 Stat. 8, 11).

matically guaranteed if made pursuant to the provisions of this subchapter, including the following:

. . .

"(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator."

Section 504 (38 U. S. C. 694d) gives the Administrator the power to promulgate necessary and appropriate rules and regulations for carrying out the provisions of the statute.

(c) Regulations.

Regulations under the Servicemen's Readjustment Act of 1944 were promulgated by the Administrator (11 F. R. 2118-2126). Section 36:4336 of such regulations provides (11 F. R. 2124):

"No loan is guaranteeable or insurable the proceeds of which have been expended or will be expended for property, or for construction, alterations, repairs or improvements, the purchase price or cost of which is in excess of the reasonable value of the same as determined by a proper appraisal made by an appraiser designated by the Administrator."

And Section 36:4303(c) provides, in part (11 F. R. 2120):

"Evidence of automatic guaranty or of insurance will be issuable if the loan is reported to the Administrator within 30 days following full disbursement, and upon the certification of the lender that:

"(i) The loan has been made in full accordance with the terms and provisions of the act,"

Facts.

During 1946, appellant, operating under the name of Personality Homes, purchased lots in Tract 9733 in Los Angeles for resale [T 454-5, 457]. After appraisers had checked and found the lots suitable for veterans' homes [T 458, 497], appellant began in May, 1946, selling the lots to veterans [T 459], selling between 45 and 50 lots in all [T 496]. With the lots, appellant also signed the veterans up to contracts to have houses built on the lots by Culver City Housing Corporation [T 470], each house and lot being a package deal [T 487]. Each of the 45 or 50 transactions was handled the same as the transactions in the indictment [T 505-6].

The transactions in the six counts involved in the appeal fall into two basic patterns, the double escrow transactions (Counts 4, 6, 11, 12 and 14) and the single escrow transactions (Count 9). Typical of the double escrows was the Wilder transaction (Count 6). Wilder selected at appellant's office a house to be built for $8450, and a lot for $2450, a total of $10,900 [T 198-9]. Appellant told him the G. I. loan could only total $10,000 and would hence cover only $1550 of the $2450 for the lot [T 198], and that he must pay the $900 extra to appellant in cash from his own funds, which he did [T 199, 200, 202, 204, 207]. Appellant herself testified [T 477-8]:

> "Well, we told Mr. Wilder that it would be necessary for him to have two escrows, one showing the balance to be paid by the loan and the other to show the exact amount of the lot, the cost of the lot. And I asked him if he had a friend or relative that the first escrow could be made to; and he said he didn't, and the salesman was present at that time, and I don't remember whether I asked Mr. DeSpain or whether

> Mr. DeSpain volunteered to use his name, but anyway, the first escrow was made to Mr. DeSpain and his wife."

DeSpain and his wife sigined an escrow instruction in which they purported to buy a lot from appellant for $2450 [T 243, Gov't Ex. 24-A], and a second escrow at the same time in which the DeSpains purported to sell the same lot to Wilder for $1550 [T 244, Gov't Ex. 25-A]. DeSpain paid no moneys at all in connection with the escrows [T 244], took no part in preparing the escrow papers [T 245], and was a purchaser in name only [T 256]. Both escrow instructions were prepared by appellant [T 478], and were used at the Pico-La Cienega Branch of the Bank of America [Gov't Exs. 24-A and 25-A].

The G. I. loan to Wilder was made by the Bank of America, Santa Monica Branch. That branch reported the loan to the Veterans Administration on the Home Loan Report [Gov't Ex. 4-A], which contained a certification by the bank that the price paid by Wilder for his lot was $1550.00, and that such price did not exceed the reasonable value as determined by proper appraisal. The normal bank practice was to fill out the Home Loan Report from documentary evidence in the bank file, principally copies of the Pico-La Cienega escrow instructions and statements [T 38, 47, 55, 56, 269, 271, 272, 281, 282, 311, 313, 314, 315], because the bank officer who made the certification would not have talked personally to the veteran [T 269]. The Santa Monica branch would have requested documentary evidence from Pico-La Cienega as to the purchase price paid by Wilder for the lot, and would, of course, have been furnished a copy of the escrow instruction and escrow statement of the only escrow to which Wilder was

a party, *i. e.,* the one between DeSpain and Wilder at $1550 [T 37, 45, 300, Gov't Exs. 13-A and 13-B].[1]

The other double escrows (Counts 4, 11, 12 and 14) followed the same identical pattern, the only differences being as to the persons used in the double escrow transactions,[2] and the amounts of the unreported cash side payments.[3]

The Kornfeld transaction (Count 9) was a single escrow transaction. Kornfeld bought a $1750 lot, paying $250 in cash, representing the amount in excess of what the G. I. loan would cover [T 141, 479]. Only one escrow was used, from Karrell to Kornfeld, reciting a sales price of the lot of $1500 [Gov't Ex. 27-A], instead of the true price of $1750. The escrow papers said nothing of the $250 paid out of escrow. Kornfeld's wife noticed when they signed the paper that it was for $1500, and not for the full $1750, and asked about it. Appellant said it was a mere formality to make the paper conform with the maximum loan possible [T 144, 154-5]. The sale price of the lot was reported to the Government at $1500, instead of the true price of $1750 [Gov't Ex. 6-A], the Santa Monica branch using the escrow instructions in the same fashion as in the double escrow cases.

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[1]Payment for the lots was achieved as follows: The indicated cost of the lot, $1550, would be transferred from the loan funds of Santa Monica to the $1550 escrow at Pico-LaCienega by non-negotiable order [Gov't Ex. 13-C]. At Pico-LaCienega, the proceeds of the $1550 escrow would be transferred to the $2450 escrow [Escrow Work Sheets, Gov't Ex. 24-B and 25-B]. The $2450 escrow instructions would recite that $900 cash was paid out of escrow. The $1550 transferred and the $900 out of escrow would make up the price [Gov't Ex. 24-A].

[2]Bentivegna [T 469]; Chamberlain [T 218, 482]; Regester [T 179, 181, 482]; Higgins [T 160, 161].

[3]Bentivegna $600 [T 124, 125, 468, 469]; Chamberlain $700 [T 218, 484]; Regester $600 [T 178, 483]; Higgins $300 [T 159, 160].

Appellant admitted the basic facts—*i. e.*, the cash payments out of escrow and the amounts [T 468-9, 472, 477, 479, 484, 505-6] and the uses of the double and single escrows. As to the double escrows, she said [T 469]:

> "Well, I don't remember the exact words I told him, but in substance it was the same as I had told all the rest of the GI's; that we had to open two escrows and one of them was for the amount of the loan and the other was for the purchase price of the lot."

Of the single escrows, she said [T 480]:

> "Well, the same reason in this case as it was in the other one; some of them were two escrows and some of them were one, and in my assumption, the only thing that the bank should have been interested in was the amount of the loan, and not the amount that I was selling the lot for."

Appellant was given blank escrow instructions by the Pico-La Cienega branch. She took them away and returned them filled out and signed [T 331-2]. Appellant conceded that she drew up the escrow instructions in her office [T 463, 478]. Appellant also admitted she knew that all the veterans were buying under G. I. loans [T 500].

Appellant had the equivalent of a college degree, having completed a business and an art course [T 503]. She had owned and operated a business known as the Acme Board of Creditors. If a person became involved financially and could not meet his obligations, he could go to Acme and appellant would work out a budget, receive all his income, and pay his obligations [T 503-4]. In July of 1945, after taking a course of instruction, appellant passed the examination and received a California Real Estate Broker's License [T 494-5]. Despite this, appellant testified that

she was not familiar with methods of handling escrows [T 455, 474, 499]. At one time she contended that the Bank of America told her how to make out the escrow papers [T 456-457, 463-4], and at another time that the builder of the houses told her [T 498-9], and at another time that all the bank should have been interested in, in her assumption, was the amount of the loan, not the price [T 480].

The basic figures as to each count are set forth in the following table:

Count & Veteran	Sales Price Reported in Home Loan Report	Lot Appraisal	Price Actually Paid
4 Bentivegna	$1550 (Gov't Ex. 2A)	$1650 (Gov't Ex. 2B)	$2150 [T 125]
6 Wilder	1550 " " 4A	1750 " " 4B	2450 [T 198]
9 Kornfeld	1500 " " 6A	1500 " " 6B	1750 [T 144]
11 Chamberlain	1300 " " 7A	1500 " " 7B	2000 [T 217]
12 Regester	1550 " " 8A	1650 " " 8B	2150 [T 178]
14 Higgins	1750 " " 9A	1750 " " 9B	2050]T 160[

Summary of Argument.

The argument is divided into five parts. (1) The first part deals with appellant's attacks on the sufficiency of the indictment to charge a crime, because of alleged deficiencies in the statutes and regulations on which it is based, and demonstrates the validity of such statutes and regulations. (2) The second part discusses whether appellant is charged as a principal or, as appellant mistakenly asserts, as an accessory. (3) The third part demonstrates that the evidence is sufficient to sustain the verdict. (4) The fourth part explains why the portion of the sentence dealing with restitution should stand. (5) The last part merely affirms the denial by the court below of various motions, and raises no questions not discussed in the four preceding parts.

I.

The Indictment Charges a Crime Under Valid Statutes.

A. It Is a Criminal Offense to Cause a False Certificate to Be Submitted.

Appellant objects to the sufficiency of the indictment to state a criminal offense on the grounds: (1) that the statute does not call for the certification as to price on which the indictment is based (AB 8-9); and (2) the regulations requiring such certification are not authorized (AB 13-16).

The policy and procedure as to G.I. loans to purchase homes are set forth in the statutes and regulations. To be eligible for guaranty, the loan must be on property for which the price to be paid does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator (38 U. S. C. 694a). The statute further gives the Administrator power to promulgate rules and regulations necessary and appropriate for carrying out the provisions of the statute (38 U. S. C. 694d). One such regulation, duly promulgated, is that the lender shall certify, before the guaranty is issued, that the loan has been made in "full" accordance with the terms and provisions of the Act (Sec. 36:4303; 11 F. R. 2120). This certification is made on the Home Loan Report, a form filled out by the lender, which both reports the making of the loan and contains certifications by the lender that various requirements of the Act have been met.

The statute and regulations must be read together. Regulations requiring a certification as to the facts making the loan eligible under the statute are certainly

necessary and appropriate to carry out the provisions of the Act. Appellant's argument that the Administrator cannot promulgate regulations the violation of which is a crime (AB 14-15) misses the point.[1] He can promulgate regulations to carry out the Act, such as requiring some proof, by certification or otherwise, that the loan to be guaranteed is eligible. When a false certification is made, it violates any statute making it a crime to make false certificates to the Government.[2] Cases have gone far, particularly under Section 80 of Title 18 (1946 Ed.), in finding false statements required by regulations or government forms to fall within criminal statutes covering false statements to the government. *Cf. Fuller v. U. S.*, 110 F. 2d 815, 817 (C. C. A. 9, 1940) cert. den., 311 U. S. 669; *U. S. v. Zavala,* 139 F. 2d 830, 832 (C. C. A. 2, 1944); *Sanchez v. U. S.,* 134 F. 2d 279, 283 (C. C. A. 1, 1943), cert. den. 319 U. S. 768; *U. S. v. Barra,* 149 F. 2d 489, 490 (C. C. A. 2, 1945); *Todorow v. U. S.,* 173 F. 2d 439, 444 (C. C. A. 9, 1949), cert. den. 93 L. Ed. 1040. In *Marzani v. U. S.,* 168 F. 2d 133, 141-2 (Ct. of Ap. Dist of Col., 1948), oral statements to an official charged generally with enforcing a law,

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[1]Even on this point, appellant does not state the law accurately. *Cf.* the innumerable criminal prosecutions for violations of the numerous regulations issued by Federal officials, such as O.P.A., W.P.B. and O.H.E. regulations, to name but a few.

[2]The false statement here was also a violation of Section 80 of Title 18 (1946 Ed.). Prosecution as a matter of policy was brought under the penal provisions of the Servicemen's Readjustment Act, a misdemeanor, because it was felt that this would more nearly approximate the Congressional intent than a felony prosecution under Section 80.

and not required by any regulation, were held within the statute. The Supreme Court affirmed the conviction without opinion, by an equally divided Court, in 335 U. S. at 895 and 336 U. S. at 922. Appellant here is not charged with violating the regulation by selling at more than the reasonable value, but with violating a criminal statute by causing a false certificate to be made to the Government as to what was actually paid. To be blunt, the crime is not overcharging, but lying.

A contention analogous to that of the appellant here was made in *Heald v. U. S.*, decided July 7, 1949, by the United States Court of Appeals for the Tenth Circuit, and as yet unreported. In that case the indictment charged a conspiracy to defraud the Government in causing the United States Veterans Administration to guarantee a loan by falsely representing the selling price of the house covered by the loan. In the course of its opinion, the Court said:

> "It is true, as contended by appellants, that the sale of the house was not a matter which was within the jurisdiction of the Veterans Administration, but passing upon applications for guaranteed loans in connection with such sales was within its jurisdiction, and the false representations which appellants caused to be made pertained to matters within its administration as an agency of the United States. Todorow v. United States, 173 Fed. 2d 439."

Appellant's points that neither the statute nor regulations call for the certification are not well taken.

B. Section 1500 (38 U. S. C. A. 697) Is a Valid Penal Statute.

1. Introduction.

Appellant objects that the penal statute here involved is bad because it involves an ineffectual incorporation by reference (AB 16-18, 20-21).

The Government contends that Section 715 is validly incorporated into the Servicemen's Readjustment Act by inexpert but adequate language, and that the practical effect of Section 1500 is to amend Section 715 so that it prohibits the use of false papers "concerning any claim for benefits under the Servicemen's Readjustment Act of 1944."

Section 1500 provides (38 U. S. C. 697):

> "Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections . . . 715 . . . of this title . . . shall be for application under this chapter . . ."

2. District Court Decisions.

A reported case squarely in point is *U. S. v. Oakland*, 81 F. S. 343 (W. D. La., 1948). Defendants there moved to dismiss an information brought under Section 697 of Title 38 that charged the defendant with falsely stating the purchase price of a home in an application for a Home Loan Guaranty. Defendant asserted that the information "does not set forth or allege the commissions of an offense against the United States . . .," in that the statutes under which it was laid "are so vague and indefinite, fail to set forth a comprehensible, intelligent, definitely ascertainable standard of criminal responsibility" and are also unconstitutional under the 5th

and 6th amendments. After quoting Section 715 of Title 38, Chief Judge Dawkins said (81 F. S. 344):

> "Whatever may be said as to other offenses under the Act of June 22, 1944, a false statement of the character charged in the bill clearly falls under and only under the last quoted statute, which, in effect, is made part of the said World War II Veterans Act of June 22, 1944. It deals entirely with false statements or representations made to any agency or department of the Government in the prosecution of a claim for money, property, or other benefits. See Panama Railroad Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, and also United States v. Gilliland, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598.
>
> "It is not believed necessary to discuss at length the principles and jurisprudence on the question of the adoption of provisions of earlier statutes by subsequent acts of Congress. It suffices to say that I believe there can be no confusion or doubt about the applicability of the law in the manner stated in the present case."

In this circuit, Judge Yankwich had the same problem before him in *U. S. v. Selph,* 82 F. S. 56, 58 (S. D. Calif., Jan. 27, 1949). That case also involved a motion to dismiss an indictment charging the making of a false statement under these statutes. In his written opinion, Judge Yankwich stated briefly (82 F. S. 56, 58):

> "Section 715 of Title 38 U. S. C. A., punishes both him who knowingly makes or *causes* to be made, and him *who aids or assists in,* or procures the making or presentation of, the false or fraudulent statement or writing denounced. Section 697 of Title 38 makes the section applicable to claims under the Servicemen's Readjustment Act of 1944, 38 U. S. C. A. §697."

In oral remarks supplementing this written opinion, Judge Yankwich said, in part [Trans. Jan. 27, 1949, p. 10]:

> "However, the Congress may constitutionally adopt sections contained in other acts, and may in one penal statute make applicable to an event which occurs at a later date the penalties of the pre-existing statute, and I think that Sec. 697, although inexpertly drawn, achieves this purpose. The section says:
>
> " 'Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections 30a and 485 of Title 5, and Sections . . . 712-715 of this title, . . . shall be for application under this chapter.'
>
> "What they say, in rather an awkward way, is that they shall apply under this chapter, and it is quite evident that they intend to apply, all the administrative rights and remedies and definitions, and they use definitive in the sense of final. They specifically designate penal provisions, and I believe if they had left out penal provisions in the chapter, they would have brought all the chapter into play.
>
> "By referring to Sections 712-714, I believe it leaves no room for doubt that what they intended to do was to apply these sections to instruments to be prepared under the Veterans Act, so as to apply the pre-existing statute to the new situation which has arisen by reason of the passage of the Veterans Act."

The same ruling has been made in each case in which the question has been raised in the Southern District of California.[1]

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[1] *United States v. Theodore,* No. 19981, 9/24/48, Judge Peirson M. Hall.

United States v. Selph, No. 20023, 9/24/48, Judge Peirson M. Hall.

The valid incorporation by Section 697 of Title 38 of non-penal provisions of the statutes enumerated therein has apparently been assumed without question in *Slocumb v. Gray,* 82 F. S. 125, 126 (Dist. of Col. 1949) and *International Union v. Bradley,* 75 F. S. 394, 396 (Dist. of Col. 1948).

3. The Congressional Intent Was to Incorporate Such Penal Statues.

A reading of the legislative history of the Servicemen's Readjustment Act of 1944 demonstrates the Congressional intent to integrate that Act with the existing Federal legislation on veterans' benefits in order to provide for a uniform system of administration and sanctions. An explanation of the purpose of Section 1500 is found in Senate Report No. 755, 78th Congress, 2nd Session (Senate Report 78-2, Volume 3-59), wherein it is stated:

> "Section 1600[1] makes applicable to all the titles of the act, except as otherwise provided therein, the administrative, definitive, or penal provisions of Public Law 2, Seventy-third Congress. This integrates the entire act with the system of benefits initiated under and authorized by said Public Law 2, Act of March 20, 1933, and the Veterans Regulations issued thereunder as subsequently amended by statutory enactment. Among other things it makes applicable the definition of the term 'person who served' as in-

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United States v. Branum, No. 20337, 11/8/48, Judge Peirson M. Hall.

United States v. Selph, No. 20657, 6/6/49, Judge Jacob Weinberger.

United States v. Young, No. 20329, 2/25/49, 3/3/49, Judge William C. Mathes. This case is presently before this court on appeal as *Young v. U. S.,* No. 12226, on this very point.

[1]Now Section 1500 (38 U. S. C. 697).

> cluding any person, male or female, commissioned, enlisted, enrolled, or drafted, who served in any of the armed forces of the United States, including the Army, Navy, Marine Corps, Coast Guard, or any of the components thereof. Likewise it will make applicable the provisions of section 5, Public Law 2, concerning the finality of decisions of the Administrator, except as otherwise provided, but it would not carry forfeiture for fraud under title V inasmuch as the penalties for fraud under said title are specifically provided in section 1400."[2]

This shows clearly that the Congressional intent was to carry over into the Servicemen's Readjustment Act both the administrative and penal provisions of Public Law 2.

The fact that there is an express penal clause (Sec. 1301, 38 U. S. C. 696*l*) in Title V of the Servicemen's Readjustment Act, dealing with Employment Readjustment Allowances, and no special penal clause in Title III, dealing with loans, does not mean that Congress meant to impose no criminal penalties as to loans. Section 1500 is in Title VI of the original act, and that title, the last one of the act, begins as follows (58 Stat. 300):

"TITLE VI.

CHAPTER XV.—GENERAL ADMINISTRATIVE AND PENAL PROVISIONS.

Sec. 1500. Except as otherwise provided in this Act . . ."

The final title is the logical position for a general penal provision applying to the entire Act, and that is where Section 1500 was put.

The true explanation for Section 1301 (38 U. S. C. 696*l*) is that, in connection with Employment Readjust-

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[2]Now Section 1301 (38 U. S. C. 696*l*).

ment Allowance under Title V, the veteran was to deal directly with the local State agency instead of the Federal Government. The question might arise as to whether a false statement made to a State agency would constitute a criminal offense under Section 715, even though the Federal Government reimbursed the State agency for the funds it disbursed. To obviate this possible technical objection, Congress provided a specific criminal penalty for false representations in connection with claims for allowances under Title V. It must be borne in mind that in writing Title V Congress was attempting to coordinate this title with existing State legislation relating to unemployment compensation.

4. The Authorities on Incorporation by Reference Support the Above Rulings of the District Courts.

At the outset it should be noted that Section 715, standing by itself, states a crime definitely enough. In essence it states a crime similar to that outlined in Section 80 of Title 18 (1946 Ed.), but limits the crime to false statements concerning certain claims for benefits. This is a sufficient delineation of a crime, and the statute is not invalid because of indefiniteness. *Cf. U. S. v. Gilliland,* 312 U. S. 86, 91 (1941).

It is the Government's contention that Section 715 is incorporated into the Servicemen's Readjustment Act, and that in practical effect this incorporation makes Section 715 read "concerning any claim for benefits under the Servicemen's Readjustment Act of 1944." It would have been better had Congress so expressly amended the statute, but the method followed sets forth a crime with sufficient definiteness.

(a) Incorporation by Reference Generally.

Incorporation by reference is a not uncommon practice in federal legislation. The Supreme Court early stated in *Kendall v. United States,* 12 Pet. (37 U. S.) 524, 625 (1838):

> "It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes; and this has been the course of legislation by congress in many instances where state practice and state process has been adopted."

See, also, Chief Justice Marshall in *Gibbons v. Ogden,* 22 U. S. (9 Wheat.) 1, 207-208 (1824). In many states constitutional provisions now prohibit these legislative shortcuts, but there is no such federal prohibition. Hence, there can be no objection to incorporation by reference, as such.

(b) Incorporating a Limited Statute.

One difficulty raised in the present case is that Section 715 is limited on its face to claims for benefits under specific statutes, and this enumeration does not include the Servicemen's Readjustment Act of 1944, which was enacted eleven years after Section 715. However, the clear intent of Congress was to make Section 715 applicable to the Servicemen's Readjustment Act, and under the cases this is sufficient.

In *Alton Railroad Co. v. United States,* 315 U. S. 15, 18-20 (1942), the question was raised of the rights of certain railroads to bring suit to set aside the granting of a certificate of convenience and necessity as a common carrier by motor vehicle to one Fleming. The court stated (315 U. S. 19):

". . . They rest their right to sue on §205(h) of the Motor Carrier Act (49 U. S. C. Supp. §305(h)) which provides that 'Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . .' Sec. 1(20) of Part I (49 U. S. C. §1(20)) authorizes 'any party in interest' to sue to enjoin any construction, operation or abandonment of a railroad made contrary to §1(18) or (19). Such suits may be maintained not only where the railroad proceeds without authorization of the Commission, but also where it proceeds under a certificate of the Commission whose validity is challenged. *Claiborne-Annapolis Ferry Co. v. United States,* 285 U. S. 382. Hence we conclude that §205(h) has incorporated by reference the 'party in interest' provision of §1(20) . . ."

It is to be noted that Section 1(20) of Part I, which was incorporated into the Motor Carrier Act, applied on its face only to suits concerning railroads. See, also, *Panama Railroad Co. v. Johnson,* 264 U. S. 375, 391-392 (1924), and *Engel v. Davenport,* 271 U. S. 33, 38-39 (1926), arising under the Merchant Marine Act of 1920, and a similar limiting provision.

In *The Brazil,* 134 F. 2d 929 (C. C. A. 7, 1943), a libel for forfeiture of a vessel because of sale to an alien was brought under Section 836 of Title 46 (Shipping), which provided that forfeitures "may be disposed of in the same manner, as forfeitures incurred for offenses against the law relating to the collection of duties." The Customs Act (Section 1621 of Title 19, Customs Duties) provided that "No suit or action to recover any pecuniary penalty

or forfeiture of property accruing under the customs law . . . " shall be instituted except within five years of discovery of the offense. The court applied these provisions of the Customs Act, finding that to be the clear intent of Congress. It should be noted that the statute thus incorporated was limited on its face to "forfeiture of property accruing under the customs law," and that the statute incorporating it did so generally, and not by specific citation. A similar result was reached in this Circuit with little discussion in *The Tahoma,* 87 F. 2d 349, 354 (C. C. A. 9, 1936) involving substantially the same statutes, in reliance on a series of prior decisions in the First Circuit.

(c) Incorporating Criminal Statutes.

While it is true that the cases cited above deal with statutes which are not criminal, criminal statutes have been incorporated by reference. The most extreme example is the Assimilative Crimes Act (18 U. S. C. 13). That statute makes criminal any act or omission committed in certain places within the special jurisdiction of the United States if such act or omission is a crime by the law of the state in which such place is situated, although such act or omission is not made a crime by Congressional enactment. This statute thus incorporates into federal law state statutes generally, without specifying them by any citation whatever. See, also, Section 1114 of Title 18, which, though in language only incorporating the punishment imposed in Sections 1111 and 1112 of Title 18, in fact must incorporate most of their substantive provisions so that the punishment can be fixed.

The constitutionality of the Assimilative Crimes Act has long been settled by *Franklin v. United States,* 216

U. S. 559, 568-570 (1910). That statute raises many problems not present under Section 697. Under the Assimilative Crimes Act, not only must state law be consulted to see if a crime has been committed, but a very difficult question sometimes arises as to whether a federal criminal statute precludes prosecution under the State statute defining a slightly different crime. *Cf. Williams v. United States,* 327 U. S. 711 (1946). The time of enactment or amendment of the state statutes is always important, in that only those state statutes are imported into federal law that were in existence when the Assimilative Crimes Act, or its latest amendment, was passed. *United States v. Paul,* 6 Pet. (31 U. S.) 141 (1932). See, also Frankfurter, dissenting, in *Johnson v. Yellow Cab Co.,* 321 U. S. 383, 398-399 (1944). No such problem is presented here, because Section 715 was in the Code when 697 was enacted, and has not been amended since.

A guide to the degree of vagueness permissible in criminal statutes incorporating other statutes is furnished by *United States v. Stafoff,* 260 U. S. 477, 479-480 (1923). A prior decision of the Supreme Court had held that certain criminal provisions relating to the making of alcoholic beverages in violation of Internal Revenue requirements had been repealed by the National Prohibition Act. Congress thereupon passed an Act supplemental to the National Prohibition Act providing that "all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was

enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provisions of the National Prohibition Act or of this Act." In discussing this new statute, Mr. Justice Holmes said (260 U. S. 480):

> "But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. *Swigart v. Baker,* 229 U. S. 187, 198 . . ."

It should be noted that this Supplemental Act referred vaguely to a body of statute law, without identifying the specific statutes involved, and further, that once such statutes should be identified, there would be the further question of whether they were directly in conflict with the National Prohibition Act or the Supplemental Act itself. This lack of specific identification should be contrasted with the direct citation of the statutes incorporated in the present case. It is true that the words of incorporation—"shall be for application"—could be improved upon, but the will of Congress is manifest, and the form of words is not material. Hence, it is a criminal offense under Sections 697 and 715 of Title 38 to knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944.

C. The Act Imposes Criminal Penalties Upon Appellant.

1. Section 715 Applies to "Any Person."

Appellant argues that, even assuming the criminal provisions are valid, Section 715 applies only to veterans because several of the sections just prior to 715 appear to apply only to veterans, and because Section 715 provides, in part, for a forfeiture of veterans' benefits (AB 18-21).

Section 715 provides that "any person" who does certain acts "shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1000 or imprisonment for not more than one year, or both."

The sections just prior to 715 indicate a nice discretion. Thus 713 applies to "any person entitled to payment of pension" who fraudulently accepts it after the reason for it ceases. Continuing to receive a pension after your right to it ceases can be done only by a person entitled to a pension, and the statute is so limited. On the other hand, Sections 712 ("whoever"), 714 ("whoever") and 715 ("any person") cover actions which can be done by a veteran or a non-veteran, and their broad language is in contrast to Section 713. Appellant's contention would rule out from the plain coverage of these statutes the case of a person, not a veteran, falsely seeking benefits. Section 715 says "any person"—not "any person entitled to rights under this statute"—as does Section 713. The forfeiture of rights is a common clause, but it does not require, in

the face of the broad "any person" language, that a person have rights to violate the statute.

2. State Court Decisions.

Appellant argues that, based on State decisions, it is apparent that Congress made no penalty as to a false loan statement (AB 10-11). Appellant relies on certain Washington cases which hold in civil litigation between the seller and the purchaser-veteran that it is not illegal to charge more than the amount of the appraisal. The cases cited by appellant (AB 10-11) are contrary to the more realistic opinions of the Superior Court of California in *Cordell v. Fletcher*[1] and of the Louisiana Court in *Diamond v. Willett,* 37 So. 2d 338 (La. Ct. of Ap. 1948).

Appellant's argument misses the point, which is that appellant is not convicted of charging more than the amount of the appraisal, but of causing false certificates to be made as to what was paid.

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[1]Decided 12/30/48 by Judge Wm. B. McKesson, Los Angeles County Superior Court, Case No. L. B. C. 14435, unreported.

II.

Appellant Is Guilty as a Principal.

Appellant argues that because the Bank of America made the false certificates, appellant is only an aider and abettor, and can be found guilty only if the bank is guilty (AB 22-25).

In the first place, appellant is charged, not as an aider and abettor, but as a principal. The statute makes it a crime to "cause" a false certificate to be made, and the indictment charged that appellant did "cause" a false certificate to be made. The same point was raised on a similar indictment in *U. S. v. Selph*, 82 Fed. Supp. 56, 58-60 (S. D. Calif., 1949). The District Court, through Judge Yankwich, discussed the authorities at length and sustained the indictment, pointing out that the defendant was charged as a principal, and not as an aider and abettor, and that a principal can cause a crime to be committed through an innocent agent and even though the principal could not have committed it directly. See also *Jin Fuey Moy v. U. S.*, 254 U. S. 189, 192 (1920); *Spear v. U. S.*, 228 Fed. 485, 488 (C. C. A. 8, 1916), cert. den. 246 U. S. 667; *Tincher v. U. S.*, 11 F. 2d 18, 21 (C. C. A. 4, 1926), cert. den. 271 U. S. 664. It is perfectly apparent in the present case that appellant is charged as a principal and that the rule that an aider and abettor can be convicted only if the principal is guilty does not apply.

Appellant also asserts that she was guilty, if anything, of "mere acquiescence or inaction or failure to report the true price" (AB 23). The record is quite the opposite. Appellant took pains to have double escrows set up, so that a false price would be reported, and the true price concealed, and to have a false price used in cases of single escrows.

III.

The Evidence Is Sufficient to Support the Conviction.

The evidence was more than ample to sustain the conviction.

Appellant's scheme had two stages. There was the first stage, wherein appellant took affirmative action and created the deliberately deceptive escrow papers. Then there was the second mechanical stage, wherein the papers were handled by the banks in their regular routine fashion. Of the objective facts in the two stages there is no dispute. The only dispute is as to the intent with which they were done. As to that, the objective facts are eloquent.

First, let us consider the mechanical stage. The false certifications as to the prices paid by the veterans for the lots and as to the fact that the veterans were not paying more than the amounts of the appraisals were made by the Santa Monica branch of the Bank of America in the Home Loan Reports [Gov't Exs. 2A, 4A, 6A, 7A, 8A and 9A]. The certifications used the lot sales prices contained in the escrow instruction in which the dummy sold to the veteran, if it was a double escrow transaction [Gov't Exs. 22A, 25A, 29A, 31A, 33A], or in the single false escrow where no double escrow was used [Gov't Ex. 27A]. It was customary practice for the bank to base its certification as to the lot price on the documentary evidence furnished it—*i. e.*, the escrow instructions and statements covering the lots forwarded to Santa Monica by Pico-La Cienega [T 37-38, 47, 55-56, 269, 271-272, 281, 311, 313-314]. It is apparent that when asked to forward an escrow covering the sale of a certain lot to a named veteran, the bank would forward that escrow—*i. e.*, the second escrow between the dummy-seller and the veteran,

and not the first escrow, in which the veteran would not appear. This was the mechanical part of the transaction, the part as to which appellant needed only to rely on the usual and known business practices of the banks.

However, before the more or less mechanical portion of the process started, appellant had to, and, according to her admissions, did take certain affirmative action. In each case, she either used a double escrow, or a single escrow which did not recite the full price [T 480]. Appellant's candid admission of her concealment was [T 480]:

> ". . . and in my assumption, the only thing that the bank should have been interested in was the amount of the loan, and not the amount that I was selling the lot for."

Appellant admitted suggesting a third person for the double escrows and stating to the veterans that the first escrow between her and the dummy was to be at the true price, and the second escrow between the dummy and the veteran was to be at the legal price [T 461-2, 469, 477-8, 482]. Appellant admitted that she filled out the blank escrow instructions in her own office, and not at the bank [T 463, 478], and that she knew all the transactions were G. I. loans [T 500].

A peculiar inconsistency of the double and single escrows illustrates that their true purpose was to deceive. In the case of the double escrows, the first escrow between appellant and the dummy would not only state the true price, but would recite the payment outside of escrow of the cash payment made by the veteran out of escrow [Gov't Exs. 21A, 24A, 28A, 30A, 32A; see AB 27-28]. This escrow is the one in which the veteran would not appear, and would not go to the loaning and reporting bank when the veteran's lot purchase escrow was requested. However,

when a single escrow directly between appellant and the veteran was used, the true price would not be stated, and the cash paid out of escrow would not be mentioned [Gov't Ex. 27A]. The obvious inference is that the entire scheme was to conceal the true price from the Government, as was so effectively done.

Appellant repeatedly stated she didn't know what escrows were for [T 455, 474, 499], and that she was merely doing as she was told by people who knew [T 456-7, 463-4, 498-9]. This despite the fact that she had been for over a year, not a mere real estate salesman, but a real estate broker [T 494-5]; that she had the equivalent of a college degree in business and art [T 503]; and had previously operated a prorate enterprise which ran the affairs of persons in financial trouble [T 503-4]. What the jury, to whom the question was properly left, thought of this is apparent from their verdict. Of the contention that appellant thought the double escrows were needed so the bank could be given an escrow showing the amount to be loaned, or the amount still due and owing after the cash payment, Judge Mathes said at the time of sentence [T 645]:

> "Well, the defendant said so, but she is too smart a woman to have thought that, in my view, and I am sure that was the jury's view."

Appellant contends that she had no knowledge of the actual appraisals (AB 26). The crime of which appellant was convicted is not charging more than the appraisals, but causing the true facts as to the prices paid to be concealed from the Government. For that it is not vital that appellant know the amount of the appraisal. However, as bearing on appellant's knowledge, she admitted that she knew that G.I. loans were involved in all cases

[T 500] and that she arranged before any of the lots were sold to have appraisers look at the lots for their suitability for G.I. loans [T 458]. Her salesman, De Spain, testified that she told him the amount of the appraisals [T 258, 261, 262, 264].

Appellant makes much of the point that the first escrows of the double escrows, those between appellant and the dummies, disclosed the true facts. She contends that the Pico-La Cienga branch of the Bank of America, where such escrows were, must be charged with knowledge of them, and that Santa Monica and Pico-La Cienega are but branches of the same bank, so that there was no causing a false statement to be made (AB 27-34). It is true that there was information at one branch which, if examined, might raise a question. However, appellant set up the double and single escrows so that, if the bank followed its normal procedures, a false figure would be reported to the Government. There is no evidence in the record of collusion between anyone in the bank and appellant, nor even any evidence that anyone in the bank had actual knowledge at the time of the true sales prices. The evidence was that appellant so rigged the transactions that if the bank followed its normal practices, false prices would be reported, and that is exactly what happened.

The testimony of Schacklett, alluded to at page 27 of Appellant's Brief, related only to papers in the first escrow of the double escrows, those on which the veterans' names did not appear. These papers never reached the Santa

Monica branch. Williams never testified that any papers in the second escrows, those on which the veterans' names appeared and which were forwarded to the Santa Monica branch, showed any payments out of escrow, and an inspection of such escrows [Gov't Exs. 22A and B, 25A and B, 29A and B, 31A and B and 33A and B] will show that he could not so testify (*cf.* AB 27).

On the undisputed evidence and appellant's own admissions, it is thus clear that there was abundant evidence to sustain the conviction.

IV.

The Validity of the Sentence.

Appellant contends that the sentence is bad in that it orders restitution in circumstances not covered by the statute (AB 34-36).

In the first place, this objection is one which is not specified in Appellant's Statement of Points on Appeal [R 34-35]. See *Behn v. Campbell,* 205 U. S. 403, 409-410 (1907). It is, therefore, not before the Court. In the second place, objection to the sentence was not made at the time it was imposed. Appellant had ample notice of what the Court intended to do prior even to the imposition of sentence, since the question of the amounts of restitution and who should receive it was discussed in open Court one week prior to sentence [T 657-659]. Further, appellee served on appellant prior to sentence a statement naming all the veterans as to whom restitution was sought

and the amounts [T 659, 666, 667]. The question of the sentence is raised for the first time in appellant's brief.

If this Court is inclined to consider the question on its merits, Section 3651 of Title 18 gives the judge the power to place a defendant on probation "upon such terms and conditions as the court deems best". It then continues:

> "While on probation and among the conditions thereof, the defendant . . . May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and . . ."

The sentence imposed was the same on each count, to be concurrent. Appellant was sentenced to imprisonment for one year and a fine of $1000, with execution thereof suspended and appellant placed on probation for five years, the conditions being that she should make restitution of $7300, the proceeds thereof to be used to reduce the loans of eighteen named veterans, and that she pay a fine of $2700 [R 27-31]. The total pecuniary cost to appellant by this was thus to be $10,000, and the restitution was obviously an integral part of the overall sentence and probation intended to be imposed by the judge. The restitution as to each veteran as fixed by the court was the difference between what was actually paid by the veteran and what was reported to the Government, *i. e.,* the financial extent of the lie [T 668, 670-1].

The distribution of the eighteen veterans to whom restitution was ordered, is as follows:

	Count	Veteran	Restitution Ordered
a) Counts on which conviction had	4	Bentivegna	$600
	6	Wilder	900
	9	Kornfeld	250
	11	Chamberlain	700
	12	Regester	600
	14	Higgins	300
b) Counts where jury found appellant guilty, but judgment of acquittal entered by Court.	2	Weinstein	450
	5	Friedlander	200
c) Counts dismissed because no evidence offered.	1	Booth	250
	3	Marklin	500
	7	Rosenstone	500
	8	Orlansby	200
	10	Fowler	450
	13	Howell	300
	15	Schwarz	250
	16	Kirkpatrick	300
	17	Abramson	300
d) Not in indictment.	....	Stein	250

Such restitution was not to be made to the veterans directly, but to be applied on their loans, so that, while the veteran would benefit by reduction of the loan, the Government would benefit also from reduction of the guarantee on the loan [T 657]. As previously stated, the figures used were submitted in advance to the Court and

opposing counsel, and no question was raised as to the accuracy of the figures as such [T 667-668].

Appellant now contends that the sentence was invalid as to the probationary portion because (1) restitution was ordered for alleged offenses as to which no conviction was had, and (2) no actual damage or loss were shown to have been caused (AB 34-36).

The cases are not conclusive. In *United States v. Follette,* 32 F. S. 953 (E. D. Pa. 1940), Circuit Judge Maris, sitting as a District Judge, ruled that, where a defendant had pleaded guilty to embezzlement of $203.99, the court could not make it a condition of probation that restitution of $466.28 be made to the Surety Company, such being the amount paid the United States on a surety bond. However, in *United States v. Berger,* 145 F. 2d 888, 891 (C. C. A. 2, 1944), cert. den. 324 U. S. 848, the court sustained a probationary order covering the restitution of $27,094.08 in unpaid overtime wages, the sum to be paid into a fund and "allocation of the said restitution among the said industrial workers and the amount to be paid to each is to be determined by the Director of the New York Regional Office of the Wage and Hour Division of the United States Department of Labor or under his direction." Thus, like the present case, the total restitution was fixed, but, unlike the present, the amount to each person was not. The court sustained the probationary order, because (1) one of the counts of the indictment charged a failure to keep accurate records of the amounts due employees, so that it was said there was a sufficient basis for the order; (2) the total amount of the restitution was stipulated by the parties; and (3) the money had been paid under the order to an escrow holder. It further appeared that the probation had been

terminated when the money was paid to the escrow holder. The present case is analogous in that the amounts of restitution were stipulated to. Likewise, no attack was made upon the order at the time it was entered.

However, irrespective of the decisions, the language of the probationary statute is clear enough. It permits probation "upon such terms and conditions as the court deems best." It then continues, "While on probation and *among* the conditions thereof . . ." and then enumerates three possible conditions (18 U. S. C. 3651). The general grant of power in the first phrase quoted above, and the language "among the conditions thereof" would be meaningless if the judge were limited in the terms and conditions of probation to the three things enumerated in the statute. And of course it is perfectly clear that he is not so limited. Most sentences contain as a condition of probation a requirement that the defendant obey all laws, and the rules and regulations of the probation office, as did the sentence here [R 30]. Thus, the clear language of the statute and the interpretation given it generally make it plain that a judge can impose terms and conditions "as the court deems best," and that he is not limited to the three terms and conditions enumerated in the statute.

Conceding that this is so, can a condition be imposed of the nature of the three enumerated conditions, but going beyond their scope. The emphasis of the probationary statute is not on punishment, but on rehabilitation and readjustment, and it should be so construed. It should

also be construed from a practical point of view. Thus, if the language defining the condition can be said to be a limitation, it is a limitation only in cases where the condition is imposed on a mute defendant, and the only facts before the court on which restitution can be based are those proven in the case. However, where additional facts and figures are admitted by the defendant in open court, a different situation is presented. Then fairness and equity require that restitution extend not only to that proven, but also to that admitted by defendant. There is also a practical reason for this. Courts commonly order restitution of the entire amount conceded to be involved, where proof was offered only as to part of the amount. Were the contrary necessary, in the present case, as an example, instead of a six day trial with evidence offered on eight transactions, to prove everything would have meant evidence on eighteen transactions. And the same would be true in every case of multiple transactions where restitution might be involved. The consequent increase in the load of the courts would be considerable. It is thus plain that, where the amounts are admitted, the court has power to order restitution on all transactions.

On the argument of loss, it is clear that there has been an actual loss or damage in this case. The difference between the reported price and the paid price represents an excess payment over what the Government thought was paid, and on the basis of which it guaranteed the loan. The loss or damage to the veteran is clear, the excess he has been forced to pay. As to the government, the pur-

pose of the G. I. loans was to lend the Government's credit to veterans, and to enable veterans to buy houses with little or no cash outlay. To the extent the veteran digs into his cash reserves to raise a side payment, he is less able in case of emergency such as sickness, or unemployment, to keep up his payments on the loan, and the Government is harmed.

If this Court should find that the probationary order is bad in part or in whole, this Court should not strike out part of the sentence, or attempt to recast the sentence, but should remand the matter to the District Court for resentencing in accordance with the law. The fine and probationary restitution provide a total penalty of $10,000 to appellant, and establish a general plan of punishment and rehabilitation. The lower court should be afforded an opportunity to resentence appellant if the general plan it used is bad in part.

The cases are not helpful on what should be done as to a bad condition of probation. In *Springer v. U. S.,* 148 F. 2d 411, 415-416 (C. C. A. 9, 1945), two judges of this Court held a probationary requirement of giving blood to be void on its face and one which could be entirely disregarded, whereas one judge seemed to feel that the appellate court could not touch it, but that it was within the lower court's discretion to perhaps modify it. See also *Watkins v. Merry,* 106 F. 2d 360 (C. C. A. 10, 1939). Whether void or voidable, the conditions of probation here are so inextricably a part of each other and of the order as to require their entire reconsideration by the

court below.[1] As the Supreme Court has said in *Bozza v. U. S.*, 330 U. S. 160, 166-167 (1947):

> "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."

This Court should not grant a partial immunity by merely declaring void all or part of the restitution, without giving the lower court an opportunity to recast its sentence.[2]

V.

Appellant's Motions (a) for a Judgment of Acquittal; (b) In Arrest of Judgment and (c) for a New Trial, Were Properly Denied.

In her brief appellant raises no points in support of the above motions that are not previously discussed (AB 36-37). It follows that the above motions, in that they rely on points already discussed in this brief, were properly denied.

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[1]The lower Court will have considerable leeway to reframe the sentence. If it stays within the limits of the present sentence, there would be no question, but, it can also impose a sentence on a count heavier than the original sentence on such count, where that particular count sentence is found improper by the Court on appellant's motion. *Murphy v. Massachusetts*, 177 U. S. 155 (1900); *King v. U. S.*, 98 F. 2d 291 (Ct. of App., Dist. of Col. 1938).

[2]The Court can remand the case for resentencing. Thus, in *In re Bonner*, 151 U. S. 242, 262 (1894), the Supreme Court found a sentence improper on habeas corpus, and ordered a prisoner discharged "but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him."

Conclusion.

The crime here charged is lying to the government, and not overcharging veterans. The statutes and regulations under which the prosecution are brought are sufficient, and the indictment based on them is valid. The evidence is largely uncontradicted, and points conclusively to guilt. The probationary order was proper. The judgment below should be affirmed.

Respectfully submitted,

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